

In the United States  
Circuit Court of Appeals  
For the Ninth Circuit. 9

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EDWARD E. BRAMLETT, CHARLES R. BRAMLETT, GORDON  
F. HATCHER, E. DANA BROOKS, JULIUS GOLDFARB,  
MEYER GOLDFARB, V. R. JAMES and E. G. HEIDEN,  
*Appellants,*

*vs.*

NATIONAL UNIT CORPORATION, a corporation,  
*Appellee.*

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REPLY BRIEF FOR APPELLANTS.

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*May It Please Your Honors:*

We will follow the same order of argument as in the original brief.

As to the power of the Appellate Court to review findings as to validity and infringement, we refer to *Wilson-Western Sporting Goods Co. v. Barnhart*, 9 Cir. 81 Fed. (2d) 108 and *Chas H. Lilly Co. v. I. F. Laucks, Inc.*, 9 Cir. 68 Fed. (2d) 175.

I.  
INVALIDITY.

1. Anticipation.

Appellant seeks to avoid the effect of lack of invention over the prior art by claiming that “appellants have deliberately and wilfully copied the structure.” (Appellee’s Brief p. 5.) Similar charges appear, pages 7, 9, 15 and 18.

We disagree with counsel in these statements. If any copying was done it was by the appellee in changing his container from paper to glass; in changing the pump from white material to black after Goldfarb had come on the market with the glass container and the black dispensing means.

As appellee’s witness Kermin, stated:

“Q. When did you take it on? After Goldfarb wasn’t it? After Goldfarb showed it could be used, then you adopted it? A. Yes, I am a copy cat I guess.” [Tr. pp. 84, 85.]

Page 15 of appellee’s brief reads:

“A comparison of the appellants’ and appellee’s devices (Exhibits 7 and 5) shows a very close copying not only of structure but of appearance.”

The resemblance in appearance is because of the copying by appellee of the glass container and the black pump used by appellants. The device is described in the patent

with a paper container. This parchmentized paper container with a Kermin advertisement resting on the 3 legged stand within the outer ornamental stand, is shown beside appellants' assembly in picture 5 opposite page 10 of our original brief.

The real copying was by patentee in adopting a three legged support like that which Goldfarb had in his place of business in 1933, two years prior to patentee's application date. Compare this support with the three legged support described by plaintiff in his patent application in 1935. See illustration No. 1 opposite page 10 of our opening brief showing the two supports side by side.

As to anticipation, appellee states, pages 9-10 of its brief:

“The material elements of the appellee's patent (Book of Exhibits p. 2) are the inverted container 42, a feeder 10 closing the open end of the container, a stand 1 which detachably supports the assembly of container and feeder, and a restraining means 3 that engages the feeder and steadies the assembly. Not a single alleged anticipation shows this combination.”

Consider Appellee's Exhibit A, the three legged stand with pump attached as used in 1933 and for several years following. With it was used an inverted container or hopper. The feeder or pump, when the container is in place, closes an open end of the container where it is restricted. The three legged support is a stand which supports the assembly of container and feeder, and there is a

restraining means or attachment to the stand that engages the feeder and steadies the assembly. There is no ornamental stand that surrounds the three legged stand, as in appellee's device, and the container does not have the pump screwed on to it, but so far as the essential elements of a dispensing device are concerned, the container, pump and stand with restraining means, these existed and were in use in Goldfarb's factory which the so-called inventor Kermin had visited some time prior to making his patent application.

Each of the seven patents cited have inverted containers of various sorts, each have stands of several types, each have dispensing means, and each have means to hold the assembly steady when in use.

The material elements of a dispenser,—container, pump or feeder, stand and means to hold the assembly steady—appear in the patents in evidence, anticipating the combination. Whatever novelty or invention there may be, must be in the specific details of the device described in the patent.

## 2. Lack of Novelty and Invention.

As shown above the combination as a whole has been anticipated by the prior art. The next question is whether or not the patentee is entitled to a patent on the special form and features of his device,—do these features create a novel device of inventive character? In view of the prior art discussed above, there is neither novelty

nor invention in the subject matter of the claims in issue, but merely mechanical skill. Inverted containers appear in all the patents in evidence, Exhibits I-1, 2, 3, 4, 5, 6 and 7.

Stands appear in all of them.

Restraining means, *i. e.*, means to hold the devices steady, to prevent lateral or rotary movement, appear so far as needed in all of them.

Olipphant (Ex. Bk. p. 24) is the nearest reference with a lower stand of similar shape to the inverted container above. With respect to this patent appellee states:

“For example, Olipphant \* \* \* shows no restraint whatever.” (Brief p. 10.)

The Olipphant stand's top flaring lip sufficiently fits the bottle to prevent movement when in use.

The fact that the patentee uses a larger container than that of Olipphant with a pump which has a tendency to cause the device to wobble when pumping, required, when the side wall had a vertical opening through it, other means to hold it steady. This was because the opening through the side wall weakened the structure, particularly the top flaring lip, so as to diminish, if not entirely destroy its supporting character.

Does the substitution or addition of other restraining means than the tight fit of the top flaring lip of the Olipphant stand constitute invention? The answer is emphatically, “No, that is merely a matter of mechanical

skill.” Patentee fastened his pump to the three legged stand beneath. Defendants have a guide fastened to the wall of the stand for the back edge of the pump to slide in, which the “foreman of the shop figured out” [Tr. p. 103], *i. e.*, it was merely a matter of mechanical skill in both cases.

### 3. Inutility.

Claims 2 and 3 describe a stand with “a substantially vertical opening in the wall of said stand.” Such a stand furnishes insufficient support for the container when filled with mayonnaise. Appellee argues it could be made self supporting. But that is not what the claim provides.

The brace 5 which appellee contends is a part of the stand 1 (Brief p. 14) is not specified as such either in the claim or description. The brace is a part of the “rest” or support, even though attached to the inner wall of the stand. (Patent Ex. Bk. p. 5, lines 17-20.)

Appellee states:

“Bennett had to admit that the stand *can* support the container [R. pp. 133-134] ‘The empty container as it now stands is supported by the stand.’” (Brief p. 14.)

A stand supporting an empty container has no utility. It must be constructed to carry the additional weight of the contents.

The claims in issue read on a device lacking utility.

II.

NON-INFRINGEMENT.

Restraining means and stabilization means are different elements in the claims in issue.

Claim 2 has, in addition to the so-called “restraining means” and other elements, the following:

“said container being stabilized at the top of said stand at a point between the top and base of said container.”

Defendants’ device is not stabilized at the top of said stand at a point between the top and base of said container, but is stabilized by the guide in the back.

Patentee Kermin admitted as to defendants’ stand:

“The top supports it; the restraining device keeps it from wobbling.” [Tr. p. 81.]

In patentee’s device the means are reversed—the restraining means is in the lower rest which supports the weight of the container with its contents, but the inverted cone container is “stabilized at the top of said stand” as set out in the claim.

“Every part of the combination claimed is conclusively presumed to be material to the combination, and no evidence to the contrary is admissible in any case of alleged infringement . . .

The patentee makes all of the parts of a combination material, when he claims for any combination and not separately.”

Claim 3 is subject to the same comment. It reads:

“said container being supported and stabilized by the outwardly flaring lip of said stand.”

In the patent the bottom “rest” supports the weight and restrains the pump from lateral movement when in use while the outwardly flaring top lip of the stand 1 stabilizes it, keeps it from wobbling, which otherwise occurs when an inverted cone is supported on its smallest part. But the defendants use the top lip to support the weight and use the guide at the back to keep the container from wobbling, and not the top lip. The weight being supported in a different manner, the stabilization is also different.

The stabilization means at the top, which the patentee himself has made an element of his claims cannot be disregarded. Defendants use a different arrangement and different means devised by themselves.

There is, therefore, no infringement.

III.

NO ACCOUNTING SHOULD BE DECREED.

There has been no showing in this case that the use of the dispenser caused any saving to the defendants or gave them any profits by reason of the alleged infringement.

Appellee in claiming an accounting of profits on the sale of mayonnaise seeks to draw a distinction between direct infringement and contributory infringement. (Brief p. 23.)

Concededly under the *Carbice* case followed and discussed in *Leitch Mfg. Co. v. Barber Co.*, 302 U. S. 458, 82 L. ed. 371, the sale of unpatented staple articles of commerce (such as mayonnaise) may not be suppressed by charging contributory infringement by their use "whether the patent be for a machine, a product, or a process." (82 L. ed. p. 374.)

There is no difference in principle between direct and contributory infringement in so far as the policy of the law is to allow free competition in the sale of unpatented staple articles of commerce.

Appellee cites (p. 24 of brief) *Novelty Glass Mfg. Co. v. Brookfield*, (3 Cir.), 170 Fed. 946, where the defendant did not sell the machine but used it at a profit in the manufacture and sale of the insulators. That was a case where the insulators could only be produced by the infringing machine. In the present case the mayonnaise is not produced by the so-called infringing dispenser and the proof shows that it was sold without the use of dispensers and

by the use of other dispensers clearly of non-infringing character.

Another case cited by appellee (Brief p. 24) is *Union Electric Welding Co. v. Curry* (6 Cir.), 279 Fed. 465, where the patent covered a tool for tying wires and the profit was in furnishing wire ties suitable for use in this tool. The device could not be operated except with ties of the precise construction made by the plaintiffs and the ties which defendants made were of no use excepting in the patented machines.

Appellee states as an application of the case last cited, "So here the appellants' containers could co-operate only with appellant's stands."

The appellants' containers are not sold with the stands as the ties were in the case cited and the profit that was made by the defendants from their business was profit from the sale of mayonnaise, not from the sale or rental of containers, or the sale or rental of stands. They received absolutely no compensation from the stands themselves or from the containers, but from a common article of commerce, mayonnaise, which was distributed in the containers.

The third case relied upon by appellee is *O'Neal v. San Jose Canning Co.*, (9 Cir.), 33 F. (2d) 892. In that case there was a saving in the cost of canning beans by the use of the infringing mold. This saving of costs was held to be profits lost by the defendant's infringement. Here there is no saving in the cost of producing the mayon-

naise, nor in the cost of selling the mayonnaise, nor in any other manner.

In *Individual Drinking Cup Co. v. Errett*, (2 Cir.), 297 Fed. 733, contributory infringement of a dispensing device was found. It was committed in order that defendant could sell its cups. The defendant's Lily cup was not essential to the use of plaintiff's apparatus, the patented vending machine, which was capable of use in connection with other paper cups, which were articles of commerce of ordinary use. The case was referred to a Master for an accounting. The Master found that no profits were made by defendant and no damages suffered by plaintiff. (297 Fed. p. 734.)

There is no proof in the record that there was any advantage in the use of the so-called infringing device over what he could have derived from using any other dispensing means.

As there were no sales by defendants or any of them of the infringing dispensers, there could be no profits from sales, nor damages from lost sales.

As the only infringement charged against the Goldfarbs is the "manufacture and distribution for use of apparatus exemplified by Defendants' Exhibit 7" and as to V. R. James and E. G. Heiden, that they "have obtained and have distributed for use such apparatus", and as to the Bramletts et al., that they have violated the rights of plaintiff "by distributing and supplying for use apparatus as exemplified by Plaintiff's Exhibit 7", therefore unless the use by defendants' customers constitutes use by

defendants themselves, we have not even the use of the apparatus involved.

Remote or consequential damages cannot be allowed for an infringement of a patent.

In 3 *Walker on Patents*, page 2169, the author states:

“Pecuniary injury may result to a patentee from a particular infringement, in that it caused him to suffer competition and consequent loss, in business outside the patent infringement; . . . But pecuniary injury of any of these kinds would be such an indirect consequential matter as not to furnish any matter of a proper basis for recoverable damages.”

Appellee cannot even claim this kind of injury, because appellee does not sell mayonnaise, but is merely a holding company for the patent in suit.

Therefore there is no case here for an accounting regardless of the questions of validity and infringement.

The decree should be reversed because of invalidity of claims 2 and 3 in issue, because of non-infringement and as to an accounting.

Respectfully submitted,

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